IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 436 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DOLAT INDUSTRIES

Versus

KRISHNA OIL INDUSTRIES

Appearance:

MR AN PATEL for Appellant

MR HASIT H JOSHI for Respondent No. 1-2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 19/07/2001

ORAL JUDGEMENT

1. This Appeal is filed by the original plaintiff against the order passed below Exh.5 in Regular Civil Suit No. 1 of 2000 on 31st August, 2000 by Jt. District Judge, Jamnagar. The present respondents are original defendants.

2. Present appellant filed Regular Civil Suit No. 1 of 2000 in the Court of District Judge at Jamnagar stating that the plaintiff is a partnership firm, engaged in the business of manufacturing and selling edible oils including groundnut oil since 1984 in the name and style of "Dolat Industries". The plaintiff is registered with Sales Tax Department, etc. The plaintiff has adopted his brand name as "EKKA" for selling groundnut oil. According to plaintiff, this is the mark which is distinctive and unique trademark which displays the picture of "Four Aces". According to the case of the plaintiff having the device of Four Aces with unique lay out, get up and colour scheme started using the same by affixing on the tins of such groundnut oil since 1986. The same mark was used to be embossed on metal caps of such oil tins. The same mark also displayed in 15 Kgs. tins as well as 5 litre plastic can and 1 litre and half litre plastic bottles. It is the case of the plaintiff that the groundnut oil which the plaintiff is selling under the trademark "EKKA" and under the device of "Four Aces" is exclusively associated and connected with the goods and goodwill of the plaintiff to the extent that when the said trademark i.e. the name of EKKA or the device of Four Aces or device of Ace or Aces is called for or described of in regard to any type of edible oils including the groundnut oil, the same is understood by the customers and traders as the products of the plaintiff only and of none else. Therefore, this mark has become the property of the plaintiff of immense value and goodwill. The plaintiff further stated that the plaintiff has acquired proprietary right with regard to the mark "EKKA" under the common Law rights. The plaintiff has also submitted that the statement of accounts produced shows prosperity and progress in their business of edible oils and groundnut oil under the brand style of "EKKA". The plaintiff has also obtained AGMARK label from concerned authority.

3. It is the case of the plaintiff that they came to know from the market somewhere in the fourth week of December, 1999 that the respondent No.2 has started selling the groundnut oil affixed with the trade mark label containing the words "TIN EKKA" and the device of "Three Aces" and the device of groundnuts. It is the case of the plaintiff that the groundnut oil sold by defendant No.2 under the above said trade mark which is identical and deceptively similar to the trade mark label of plaintiff, causes confusion in the minds of the customers. It is the case of the plaintiff that the trade mark of the defendants respondents "TIN EKKA" is

also identical and deceptively similar in style, manner, lay out, get up, colour scheme and placement of various features so as to come closer to the brand style of its trade mark label and the plaintiff's trade mark "EKKA" with the device of "Four Aces". This, according to the plaintiff, results in grave passing off their goods as the goods of the plaintiff with the intention to gain illegally upon the vast popularity of the plaintiff and trade mark style used by them and to damage the high goodwill and reputation of the plaintiff. It is the case of the plaintiff that it was within the knowledge of the defendants that the trade mark label "EKKA" has become popular amongst major cities of the Gujarat and, therefore, the defendants have deliberately and intentionally imitated the trade mark and label of EKKA and the device of Four Aces" of the plaintiff and have started very recently selling the groundnut oil under the above deceptively similar device. In this regard, there was some exchange of notices between the parties. The suit came to be filed for the permanent injunction restraining the defendants from using the trade mark label "TIN EKKA" with the device, which is similar to the plaintiff and thereby restraining them from passing off their edible oils and groundnut oil as the goods of the plaintiff.

4. The plaintiff has also asked for damages caused to them due to the action of passing off goods by the defendants as mentioned above.

5. In the above said suit, the plaintiff - appellant filed an application - Exh. 5 for the temporary injunction restraining defendants from using the trade mark label "TIN EKKA", which is according to the plaintiff deceptively similar to their trade mark label "EKKA" and thereby to restrain the defendants from passing off the goods as the goods of the plaintiff. At the first instance on 9th February, 2000, a Notice was issued and defendants have submitted their reply and contested the application filed by the plaintiff for temporary injunction. The defendants stated that they are trading in the name and style of "M/s Krishna Oil Industries" at Jamnagar and manufacturing and marketing groundnut oil. They have also established a very good business. It was further stated that defendants have bona fidely and honestly adopted the trade mark "TIN EKKA" with a distinctive colour combination, get up, lay out and artistic work since 1997 through out the State of Gujarat. It is the defence of the defendant that they have acquired a very good reputation and good will and have acquired necessary licences from concerned

authorities for manufacturing of groundnut oil. It is contended that trade mark of plaintiff is admittedly not registered and their registration is pending. It is also contended by the defendants that they have also moved an application for registration of their trade mark on 6.10.1999 and the same is pending for consideration. It is stated that the picture of the sale advertisement shows that the defendants have acquired reputation and good will in selling and manufacturing the groundnut oil with the above said brand "TIN EKKA". The case of the plaintiff is denied that the defendants have adopted an identical and deceptively similar trade mark to create confusion in the mind of the customers so as to pass off their goods as the goods of the plaintiff. It is denied that the plaintiff have any right to file the suit, let alone have an interim injunction.

6. After hearing both the sides, learned Jt. District Judge was pleased to dismiss the application Exh.5 for temporary injunction filed by the plaintiff on 31st August, 2000 and hence this Appeal.

7. Learned Trial Judge scrutinised the documentary evidence on record. Learned Trial Judge also microscopically compared both the labels and came to the conclusion that the label of the defendants is printed in light sky blue colour in the background while the label of the plaintiff is printed in dark sky blue colour in the background. On the top of the label, the defendant label shows in Hindi "TIN EKKA" while the label of the plaintiff contains English words "EKKA" along with the phrase that "mechanically filtered pure groundnut oil" and below that the picture of "Four Aces" is displayed. Three of them are above while one is just below touching the above three Aces. While in the trade mark of defendants, only three Aces are displayed through the picture and below it in a oval shape with a red background a Gujarati sentence is printed. At the bottom of the trade mark label of plaintiff, the picture of some groundnuts appears and the groundnuts are smaller in size while the bottom of the trade mark label of the defendant shows the picture of groundnuts which are bigger in size. The learned Trial Judge thus put both the labels side by side and undertook the exercise of comparing them minutely. The learned Judge came to the conclusion that there are distinctive marks between these two trade mark labels and, therefore, they are not deceptively similar. The learned Judge also came to the conclusion that the edible oil is consumable item and is ordinarily kept in store by the consumers for a long period and when persons purchase edible oil for long period, they are not likely

to be deceived by these two labels and to take the one label for the other. The learned Judge though did not rely on the affidavits of the traders filed by the defendants stating that the two labels are not creating any confusion amongst the customers. The learned Trial Judge also did not rely on the affidavits filed by the plaintiff because those affidavits were the affidavits of the customers. From the above, the learned Judge came to the conclusion that since both the Trade marks were not similar, there was no prima facie case in favour of the plaintiff let alone the balance of convenience and hence the application came to be rejected.

8. Learned Advocate Mr.D.N.Patel for the appellant plaintiff attacking the above said order contended that the learned Judge failed to consider the profit statements produced on the record to show that right from 1984 the plaintiff had obtained reputation and goodwill with the above said Trade Mark. It was also contended that the affidavits filed by independent traders and customers were not considered by the Trial Judge. It was also contended that the Trial Judge failed to consider the similarity of both the Trade Marks from the view point of common man. On the contrary, the learned Trial Judge has taken into consideration the view point of higher class which is also not correct. It is also contended that the method adopted by the Trial Judge to compare microscopically both the labels and to come to the conclusion that there are dissimilarities between the two trade marks, is also erroneous and against the established law. It is urged that what the Trial Judge was required to consider was whether within the definition of Sec. 2(2), the label of the defendants was deceptively similar to that of the plaintiff from the view point of common man. Learned Advocate Mr. Patel has relied upon some authorities to support his contention that what factors are required to be considered in an action of passing off the goods. It is contended that the broad and essential feature of similarity of the two labels must be taken into consideration and the test which is to be applied is not to keep both the Trade Marks side by side but by imperfect recollection of an ordinary man i.e. customer. It was urged that the Trial Court adopted absolutely a wrong method to evaluate the facts of the case and the law as well. It is urged that both the labels are deceptively similar to the extent that the defendants have adopted name "TIN EKKA", almost similar colour, get up, picture of Three Aces and the groundnuts, which is sufficient to come closer to the trade mark label of the plaintiff. Therefore, it was urged that the Appeal be

allowed and the impugned order is required to be set aside and defendants be restrained from using the Trade Mark as prayed for in Application - Exh.5.

9. As against that, learned Advocate Mr. Hasit H.Joshi for the respondents - defendants has argued that the learned Trial Judge has taken correct exercise to come to the conclusion as to whether both the labels were similar, let alone deceptively similar. It was urged that "TIN EKKA" is used by the defendants since 1997 and as per their profit figures, it is clear that the defendants have prospered and have obtained good will and reputation with the brand "TIN EKKA". It is urged that as enumerated in the impugned order, the two labels i.e. two Trade Mark Labels are apparently dissimilar and cannot cause any confusion in the minds of consumers nor the label of defendants is deceptively similar that of the plaintiff. It was urged on behalf of the respondents that the language used in the labels are material to decide the issue. The language used in the Trade Mark of the defendants is in Hindi which can be read properly by person who are purchasing this edible oil from the Trade mark while the language used by the plaintiff in the Trade Mark is in English, which cannot be read by common person. It is alleged that the defendants are manufacturing the groundnut oil in 15 Kgs tins only and not in small packages. Therefore, the 15 Kgs tins will be purchased naturally by certain class of people who are highly placed in the society and are not likely to be deceived by the Trade Mark. It is urged that though the learned Trial Judge has not relied upon the affidavits of the Traders filed on behalf of the defendants, but those affidavits are of such traders who are dealing in edible oils of all brands including the brand of plaintiff and defendants, and these dealers say that the public i.e. consumer demands groundnut oil and edible oils by Trade Mark of "TIN EKKA" and therefore there is no likelihood of creating any confusion in the minds of consumers. It is argued that admittedly the Trade Mark of none of the parties is registered. The plaintiff - appellant's grievances are in regard to the infringement of the Trade Mark as per Section 2(1)(d) of the Trade and Merchandise Marks Act, 1958 and heavy reliance has been placed in the matter of F. HOFFIMANN-LA ROCHE AND CO. LTD. vs. GEOFFREY MANNERS AND CO. PRIVATE LIMITED, reported in AIR 1970 SC 2062, which describes the test to be undertaken in deciding whether Mark is deceptively similar to another mark. Reliance is also placed on a decision of this Court in the matter of THAKKAR BALVANTRAY PURSHOTTAMDAS vs. HASMUKHBHAI UGARCHAND PATEL, reported in 1994 (2) GLR 1714, wherein this Court

while considering Sections 2(d), 27 and 29 examined distinction between infringement of trade mark and passing off action. Relying on this, it was urged that in passing off action, as laid down by this Court in the above decision dissimilarity is required to be taken into consideration and, therefore, the Trial Judge has rightly undertaken the exercise to compare minutely both the labels. It was urged that the Appeal therefore is required to be dismissed.

10. Pitted arguments of both the side lead to core issue that what is required to be considered in the passing off action. A trader when obtains a link through some trade mark with his customers in respect to goods which he sells, his good becomes popular through that trade mark by long user. Other traders may also be tempted to pass off their good as that of original owner of the trade mark. This conduct of other traders gives a right of action to the original owner against other traders. Because conduct of other traders is known as unfair trade practice to the extent of deception. Passing off the goods of another is deception to obtain undue economic benefit of the goodwill which other has established in a trade.

11. To decide whether particular conduct or action is passing off, what is required to be considered is whether both the Trade Marks are strikingly dissimilar or strikingly similar so as to cause confusion in the minds of the customers. It is also required to be taken into consideration that what is the evidence available on record to come to this conclusion. We shall first examine whether the method adopted by the Trial Judge in comparing microscopically both the Trade Marks is a correct approach to decide the matter in the controversy. It is the established rule that courts should not substitute its own opinion in place of the proved facts to come to the conclusion. Whether the two Trade Marks are similar or dissimilar can be considered by an objective approach and from the evidence on record. The court should look for the independent evidence in passing off action to come to the conclusion that whether the one Mark is deceptively similar to the other Mark. Thereafter, the Court may look at the trade marks and come to the independent decision. Court cannot, in any case, put both the trade marks side by side and form subjective dissimilarity in both the trade marks and come to the conclusion that in the opinion of the court, laying both the marks side by side, comparing them, court finds certain dissimilarity and, therefore, both the trade marks are not deceptively similar. The whole

approach of the trial court is absolutely wrong in passing off the action. As said earlier, what is important is to look at both the marks in respect to their broad and essential features from the point of view of common man more particularly a common customer and come to the conclusion from the evidence on record whether the common man is likely to be deceived by one trade mark label for another. Objective, phonetic as well as visual test to find out deception, if any, must be applied. The goods which are being sold under both the labels are also required to be considered. Courts must also take into consideration kind and class of the customer, who would be likely to buy those goods. Court must take into consideration all the surrounding factor. However, the learned Trial Judge in this particular case, has failed to appreciate and evaluate the real controversy in the matter because the rule of law is that the real question which is to be decided in such cases is to see as to how an unwary purchaser who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what impression he would form by looking at the trade mark and in what respect he would connect the trade mark with the goods which he would be purchasing. Undoubtedly, an unwary customer would not have an opportunity to lay both the marks side by side and minutely examine them for similarity or dissimilarity. Therefore, I cannot accept the argument on behalf of the respondents that both the marks are dissimilar in so many respects as compared by the Trial Judge and, therefore, the confusion is not likely to cause in the mind of customer and hence the trade mark of the defendants - respondents cannot be said to be deceptively similar to that of the plaintiff. Mr. Joshi has relied on a decision of the Supreme Court in the matter of Roche & Co. v. G.Manners & Co. (supra), which is a case of "Dropovit" and "Protovit". Whether those trade names are deceptively similar or not? This question arose before the registrar of the Trade Marks to decide whether one mark was deceptively similar to other mark. The Apex Court observed in the said decision that the mark must be compared as a whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case, there is no sufficient similarity to cause confusion. The Apex Court further observed that the true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. Therefore, as stated in Lavroma case, TAKALON LTD. v. DAVIDSON AND CO. reported in 32 RPC 133 which is

referred by the Apex Court in the above said case, it is observed that "we are not bound to scan the words as we would in a question of comparatio liberarum. It is not a matter for microscopic inspection, but to be taken from the general and even casual point of view of a customer walking into a shop."

12. However, this principle of law laid down by the Supreme Court is nowhere supporting the case of the respondents. On the contrary, the Apex Court has laid down a principle as above said to come to the conclusion in respect to alleged similar trade marks. The principle must be held good either before the Registering Authority or before any court. When we follow the principle laid down by the Apex Court in this decision, then also, it is clear that the exercise undertaken by the Trial Court is absolutely erroneous to compare both the labels and to draw a subjective conclusion about microscopic dissimilarity.

13. Learned Advocate for the respondent Mr.Joshi has also argued that admittedly neither the trade mark of the plaintiff nor the trade mark of the defendants is registered and, therefore, the dissimilarity in comparison of both the marks will have to be taken into consideration. Learned Advocate Mr. Joshi has relied on the decision of this Court in the matter of THAKKAR BALVANTRAY (supra). This Court on relying on a decision of the Supreme Court in the case of KAVIRAJ PANDIT DURGA DUTT vs. NAVRATNA PHARMACEUTICALS LAB., reported in AIR 1965 SC 980, observed that when the mark of the plaintiff is not registered at all and the product is of common use and when there is a case of passing off, when there is no right in the plaintiff, the mark of defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff. But, that is not the case here. The case here is undoubtedly edible oil i.e. groundnuts oil and the principle is that in an action of passing off, in common law in equity rights when plaintiff sues, the court will have to decide whether the mark of the defendant is deceptively similar to that of the plaintiff. On evidence adduced on record when courts will appreciate and decide the controversy, the courts are bound to follow the principles as laid down by the Apex Court in the case of ROCHE & CO. v. G. MANNERS & CO. (supra). Therefore, the contention that as per the ratio laid down in THAKKAR BALVANTRAY (supra) by this Court, the exercise of the trial court comparing both the label was legal and permissible to arrive at a conclusion for the breach of the registered trade mark would be

fully misconceived. What is laid down by this Court in THAKKAR BALVANTRAY (supra) is when the concerned trade mark is registered and defendants had adopted the trade mark of the plaintiff, the change or difference in get up, making or other writing on the goods or on the packets in which the defendant offers his goods for sale would not be material. While, in an action of passing off when the right is claimed in equity i.e. when the mark is not registered, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff. But, for deciding the deceptively similar trade mark in passing off an action also, undoubtedly, the test would be as stated above i.e. the view or imperfect recollection or impression of a casual customer walking into the shop. In the above said case this Court in para 10 further observed that it is the get up, packing and the plastic pouches which is decisive and on facts the particulars were found drastically different by this court in both the marks in question.

14. Learned Advocate of the appellant has placed heavy reliance on the decision of the Supreme Court (Hon'ble Three Judges Bench) in the matter of CADILA HEALTH CARE LIMITED vs. CADILA PHARMACEUTICALS LIMITED, reported in Jt 2001 (4) SC 243 with reference to the mode adopted by the Trial Judge by laying down both the trade marks side by side and bringing dissimilarity, the observation of the Apex Court in the CADILA's case (supra) is very material. The Apex Court made reference to the case of S.M. DYECHEM LTD's case, reported in JT 2000 (7) SC 151 : (2000) 5 SCC 573, decided by Two Judges Bench of the Apex Court. The Supreme Court in Cadila's case noted the observations of Dyechem's case as under :

> "Broadly, under our law as seen above, it can be said that stress is laid down on common features rather than differences in essential features, except for a passing reference to a limited extent in one case."

15. Apex Court in Cadila's case (supra) after referring to the aforesaid observations observed that "Notwithstanding the abovesaid observations this Court in Dyechem's case proceeded to observe as follows :

> " It appears to us that this Court did not have occasion to decide, as far as we are able to see, an issue where there were also differences in essential features nor to consider the extent to

which the differences are to be given importance over similarities. Such a question has arisen in the present case and that is why we have referred to the principles of English Law relating to differences in essential features which principles, in our opinion, are equally applicable in our country".

16. Apex Court in Cadila's case after referring to the above observations in Dyechem's case (supra) in para 18 observed that

" we are unable to agree with the aforesaid observations in Dyechem's case (supra). As far as this Court is concerned, the decisions in the last four decades have clearly laid down that what has to be seen in the case of a passing off action is the similarity between the competing marks and to determine whether there is likelihood of deception or causing confusion. This is evident from the decisions of this Court in National Sewing Thread Co. Ltd's case (supra), Corn Products Refining Company's case (supra), Amritdhara Pharmacy's case (supra), Durga Dutt Sharma's case (supra), Hoffmann-La Roche & Co. Ltd.'s case (supra). Having come to the conclusion, in our opinion incorrectly, that the difference in essential features is relevant, this Court in Dyechem's case (supra) sought to examine the difference in the two marks "Piknic" and "Picnic". It applied three tests, they being (1) is there any special aspect of the common feature which has been coupled? (2) mode in which the parts are put together differently i.e. whether dissimilarity of the part or parts is enough to make the whole thing dissimilar and (3) whether when there are common elements, should one not pay more regard to the parts which are not common; while at the same time not disregarding the common parts? In examining the marks, keeping the aforesaid three tests in mind, it came to the conclusion, seeing the manner in which the two words were written and the peculiarity of the script and concluded that "the above three dissimilarities have to be given more importance than the phonetic similarity or the similarity in the use of the word PICNIC for PIKNIK".

17. Thereafter, in Cadila's case (supra), the Supreme Court in Para-19 observed as under :

" With respect, we are unable to agree that the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different and the conclusion so arrived at is clearly contrary to the binding precedent of this Court in Amridhara's case (supra) where the phonetic similarity was applied by judging the two competing marks. Similarly, in Durga Dutt Sharma's case (supra), it was observed that "in an action for infringement ", the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated."

18. The Supreme Court in the above Cadila's case, in Para 20 observed as under :

" Lastly, in Dyechem's case (supra) it was observed in para 54 as under :

"As to scope of a buyer being deceived, in a passing off action, the following principles have to be borne in mind. Lord Romer, L.J. has said in Payton & Co. v. Snelling, Lampard & Co. (1900)17 RPC 48) that it is a misconception to refer to the confusion that can be created upon an ignorant customer that the courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods in the market so far as relates to general characteristics. if he does not know that he is not a customer whose views can properly be regarded by the Court. (See the cases quoted in N.S.Thread & Co. v. Chadwick & Bros. (AIR 1948 Mad 481) which was a passing off action.) in Schweppes' case (1905) 22 RPC 601 (HL) Lord Halsbury said, if a person is so careless that he does not look and does

> not treat the label fairly but takes the bottle without sufficient consideration and without reading what is written very plainly indeed up the face of the label, you cannot say he is deceived."

These observations appear to us to be contrary to the decision of this Court in Amritdhara's case (supra) where it was observed that the products will be purchased by both villagers and townfolk, literate as well as illiterate and the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. A trade may relate to goods largely sold to illiterate or badly educated persons. The purchaser in India cannot be equated with a purchaser of goods in England. While we agree that in trade mark matters, it is necessary to go into the question of comparable strength, the decision on merits in Dyechem's case (supra) does not, in our opinion, lay down correct law and we hold accordingly.

19. Thus, undoubtedly, the method adopted by the learned Trial Judge to arrive at a decision by laying both marks side by side, that both the marks are in material particular dissimilar, is not supported by the established principle of law and will have to be set aside. Learned Trial Judge, however, has not taken anything into consideration except comparison of two marks and a fact that the edible oil being the goods for a long storage, would only be purchased by class who would not be deceived by similar trade marks. The learned Trial Judge has also not taken into consideration the affidavits filed on behalf of the defendants by the traders and the affidavits filed on behalf of the plaintiff vide Exh. 12 of the consumers. On overall appreciation, the evidence of affidavits of the tradesman dealing in edible oils by labels will not be useful to come to a conclusion. From this evidence, one cannot even prima facie come to the conclusion that both the labels are deceptively similar or dissimilar as it is likely to cause or not to cause passing off goods of other marks. Similarly, the affidavits filed on behalf of the plaintiff are also of no use to come to the conclusion and some more evidence and independent test is required to be undertaken in a passing off action.

20. Reverting to the facts of this case at this prima facie stage of temporary injunction, plaintiff is required to produce evidence for the scrutiny of the

court to come to a prima facie conclusion that he is entitled to an interim injunction pending suit restraining the defendants from using his trade mark.

21. In the above mentioned Cadila's case (supra), the Apex Court vide Para 35 of the decision mentioned some tests to come to the conclusion. The Supreme Court in Para 35 of the above judgment stated as under :

" Broadly stated in an action for passing off on the basis of unregistered trademark generally for deciding the question of deceptive similarity the following factors to be considered :

(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e.both words and label marks.

(b) The degree of resemblance between the marks, phonetically similar and hence similar in idea.

(c) The nature of the goods in respect of which they are used as trade marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods and

(g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

22. In this view of the matter, while observations and the order passed below Application Exh.5 as aforesaid cannot be countenanced, at the same time, at this prima facie juncture, no order can be passed in favour of the plaintiff also because there is no evidence at this stage

to pass any interim order in favour of the plaintiff which according to the tests laid down by the Apex Court in Cadila's case (supra) can be adduced and proved by the plaintiff during trial. In this view of the matter, the following order is passed :

" The observations of the learned Trial Judge below Exh. 5 and the order passed thereon are set aside. To that extent, the Appeal is allowed with no order as to costs. However, as aforesaid, no order at this stage is passed in favour of the plaintiff below application Exh.5, and to remand application Exh.5 for fresh disposal would be futile exercise, instead, the Trial Court is directed to decide the Regular Civil Suit No.1 of 2000 within 4 months according to law from the date of receipt of writ of this Court or on producing a certified copy of the order by any of the parties, whichever is earlier. Defendants are directed to produce their statement of Accounts of their business before trial court from the date of the suit till its disposal because, in case, if any decree for damages is to be passed in favour plaintiff, the same may assist the trial court in appreciation. The Trial Court is further directed to decide the case finally after applying tests as laid down by the Apex Court in Cadila's case (supra)." D.S. permitted.

(J.R. Vora, J.)

p.n.nair